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No. 08-1454

In The Supreme Court of the United States

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,

Petitioner,

v.

MICHELLE MONTEAGUDO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the evidence presented at trial permitted a reasonable jury to find that Monteagudo's failure to invoke the employer's reporting mechanism was reasonable, thus precluding petitioner from entitlement to the affirmative defense to liability for sexual harassment by supervisors under Title VII established by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Michelle Monteagudo ("Monteagudo" or "petitioner"), presents this non-mandatory opposition to the pending Petition for a Writ of Certiorari ("Petition" or "Pet.") to place the case before this Court in its proper perspective. The petitioner, Asociacion de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA" or "petitioner"), attempts to overturn a well reasoned opinion of the First Circuit, proposing that there was no evidence for the jury's finding that Monteagudo was reasonable in not using its complaint procedure for sexual harassment claims.

Unfortunately, AEELA has failed to be fully candid and even attempts to mislead this Court in its final effort to vacate the jury verdict pursuant to which the district court's judgment was entered and subsequently affirmed by the First Circuit. *See*, Sup. Ct. R. 15.1 and 15.2. The jury found that Monteagudo was sexually harassed by a supervisor and constructively discharged from her employment as a result thereof in violation of Title VII of the Civil Rights Act of 1964 and Puerto Rico Anti Discrimination Statutes. A-601, Questions No. 1 and No. 4.

Contrary to petitioner's contentions, Monteagudo will establish that the Petition is premised on a non-existent conflict between circuits and built on a

factual foundation foreign to the jury determinations and the evidence presented at trial.[1]

Essentially, AEELA's Petition constitutes a hollow attack on the First Circuit's consonant interpretation in the decision below of this Court's decisions in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This is another run of the mill case consistent with the teachings of this Court and, certainly, not a case of national significance, except for AEELA, that would warrant intervention by this Court.[2] Accordingly, there are no "compelling reasons" for the Petition to be granted. *See*, Sup. Ct. R. 10.

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[1] Petitioner's reference to conflicts in testimony at this stage can only be understood as intended to avoid the consequences of the evidence admitted without any objection or challenge by its counsel at trial and by which it is bound in the instant proceedings. *See e.g.*, Petition at p. 4, n. 1 ("Respondent testified that Vargas and a co-worker named Marilyn Del Valle ("Del Valle") witnessed the incident in the parking lot. They both testified that they never witnessed any inappropriate conduct.") (Del Valle was the Human Resources Director's mistress and both of them were present when Monteagudo rejected the harassing supervisor's attempt to kiss her against her will.) A-953-954; 917-919; p. 7, ¶ 3 ("alleged incident in the parking lot . . . "); p. 18, n. 6 ("who allegedly was complicit in Arce's harassment"); *see also, Monteagudo v. AEELA*, 554 F.3d 164, 172, n. 7 (1st Cir. 2009).

[2] AEELA's alarm at the effect that the decision below will have of "fundamentally reworking the balance the Court struck in *Ellerth* and *Faragher*" is completely unfounded. Pet. at p. 3. For instance, a Westlaw search under "Monteagudo /5 Asociacion" reveals three (3) instances since the judgment date

(Continued on following page)

STATEMENT OF THE CASE

Monteagudo worked for AEELA until December 5, 2002. Appendix on Appeal ("A-") 968. The jury found that on that date, she was "constructively discharged from her employment . . . specifically as a consequence of sexual harassment." Addendum on Appeal (hereafter "Add.") at p. 1, Question No. 1; A-601. From the summer of 2002 until December 5, 2002 Monteagudo was a permanent Secretary at AEELA's Human Resources Department. A-936-938. The Director of that Department and her immediate supervisor was Orlando Vargas ("Vargas"). A-799.[3] As Human Resources Director, Vargas was entrusted with enforcement of AEELA's anti-sexual harassment

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of January 26, 2009. *None* dealt with the second prong of the affirmative defense and the alleged inevitable "reworking of the balance" which AEELA requests this Court to address. The contrast between AEELA's assessment of the impact of the decision below to the *Ellerth/Faragher* doctrine becomes evident when compared to the fifty (50) decisions elicited through a Westlaw search under "Ellerth /3 Faragher" that have dealt with this issue after the January 26, 2009 judgment by the First Circuit. As will be elaborated below, the scarce citations to *Monteagudo* in the last six months reflects the courts' clear appreciation of the factual nature of this case as well as a more accurate reading of the decision below in light of *Ellerth* and *Faragher* than AEELA is willing to concede.

[3] Pablo Crespo, his friend and Executive Director of AEELA, had recommended Vargas as the candidate for the Human Resources Directorship to AEELA's Board of Directors. A-798-799. The trial evidence demonstrated that they had known each other since 1990 or 1991, when both met at work at the Puerto Rico Senate. A-797.

policy. A-156. According to the policy, in the event that the harasser was the Human Resources Director or someone close to him, the employee was to lodge any complaint with the Executive Director. *Id.*

The Human Resources Department at AEELA in which most of the relevant events took place was about the size of the courtroom in which the instant case was tried. Supplemental Appendix on Appeal ("SA") 11. In addition to Vargas and Monteagudo, two other employees of the Human Resources Department testified at trial: Juan Francisco Arce ("Arce") and Marilyn Del Valle ("Del Valle"). Arce was a mid-level supervisor and the individual who sexually harassed Monteagudo. A-908; 917-919; 927-928. He was married and approximately twice Monteagudo's age. A-931, 1043. Arce, Vargas and the Executive Director at the time, Pablo Crespo ("Crespo") were friends and would go out for drinks together. A-798-800; 954-955; 976.

Del Valle was a Secretary at the Training and Scholarship Division of the Human Resources Department. A-906. Del Valle was a friend of Monteagudo and often went out together. A-907. At all relevant times, Del Valle was having an affair with Vargas. A-950-951. He was also married. A-1004-1005. On several occasions, Del Valle asked Monteagudo to go out with Arce so that she would be with Vargas and the four could "double date." A-965. Arce also made repeated invitations to Monteagudo for these "double dates" despite her regular refusals. A-961.

From the summer of 2002 until December 5, 2002, Monteagudo was sexually harassed by Arce, with the knowledge and *imprimatur* of AEELA, through Vargas, its Human Resources Director. A-810; 911. While Vargas was primarily entrusted with enforcement of the anti-sexual harassment policy, he did not report this harassment to his friend and the Executive Director, Pablo Crespo, as required in section 3.3 of the policy. A-156. Del Valle and José Figueroa ("Figueroa"), the employees who testified as to the harassment, did not report it either. A-911; SA-13. Crespo, the Executive Director admitted that the obligation to report harassment applied to all employees, including Vargas. A-810.

Figueroa was a messenger, who would make daily visits to AEELA's Headquarters to distribute correspondence. SA-6. On one occasion, while doing his rounds, he saw Arce put his hand on Monteagudo's waist and observed her reaction in trying to dodge his advance. SA-10. This occurred at Monteagudo's work station. Later, she explained to Figueroa that Arce "would always try to seek a way so he could touch her." SA-12. Figueroa commented to Monteagudo that he believed that her chances of solving her problem within AEELA were slim because it was something "extremely difficult and delicate" . . . because it "dealt with Mr. Orlando Vargas and Mr. Arce." SA-19.

Although Del Valle witnessed the incident at the parking lot of the local pub where Arce forcefully tried to kiss Monteagudo and she refused, Del Valle did not

report the same. A-914. Del Valle also declared that she saw Arce at Monteagudo's workstation on a daily basis. A-924. To questions by AEELA's counsel, Figueroa explained that he feared Vargas and, therefore, did not report what he knew, because Vargas had threatened him with discharge on a previous occasion. SA-28.

After Monteagudo's rejection of Arce's attempt to kiss her in front of Vargas and Del Valle, Vargas retaliated against her. As a result, Monteagudo's working conditions rapidly deteriorated. Vargas and Arce assigned her an onerous amount of additional work. A-967. Shortly thereafter, Vargas slammed his fist on the table and threatened Monteagudo with discharge if she dared file a complaint with the union because of the substantial increase in her workload. A-966-967. In addition to this threat and to the assignment of extra duties, Vargas sidelined Monteagudo and would not allow any co-workers to come to Monteagudo's work station, even if just to greet her. A-967-968. If Del Valle defied his instructions, he would scold her. A-968. After Monteagudo's rejection of Arce's attempt to kiss her, anything she performed at work was negatively criticized by Vargas. A-969. The tension at work increased to such an extent that Monteagudo would go home crying every day, could not sleep well, and reached a point where she did not have the will to report to work. A-962.

Monteagudo's working conditions became intolerable. A-966-969; A-601, Question No. 1. Like Figueroa,

Monteagudo had a legitimate fear that the reporting mechanism would not be effective in light of the high ranking officials involved. A-975-977; SA-13; 19. Although, Section 3.2 of AEELA's sexual harassment policy designated the Human Resources Director and the Executive Director as the officials designated for reporting sexual harassment at AEELA, A-156, Monteagudo knew that Vargas and Crespo were friends of her harasser.[4] Since Vargas was an active participant in the harassment, Crespo was Monteagudo's "impartial" channel under AEELA's policy to present her complaint against his friends. A-156.

Less than two weeks after Arce's failed attempt to kiss her and the ensuing retaliation by Vargas, Monteagudo became convinced that she had no other alternative but to resign. She did not use the reporting mechanism provided by AEELA and explained at trial that she resigned because her "fear was that *they would take reprisals like they had done before* simply because [she] did not want to be with" Arce. A-1002-1003 (emphasis supplied).

On May 29, 2007 the jury found for Monteagudo on all aspects of her claims of sexual harassment and constructive discharge in violation of Title VII of the

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[4] AEELA's attempt to object to the quality of the evidence of friendship between Crespo, Arce and Vargas before this Court is untimely and unwarranted. After all, it was AEELA's counsel who elicited this information at trial and never objected as to its admissibility. A-976.

Civil Rights Act of 1964 and Puerto Rico Anti Discrimination Statutes.[5] AEELA proved the first element of the *Ellerth/Faragher* affirmative defense, but failed on the second because the jury found that Monteagudo was reasonable in not invoking the reporting mechanism provided by AEELA. Judgment and Judgment *Nunc Pro Tunc* were entered on June 1, 2007. Add.-3; 5.

From all the evidence presented, including proof of retaliation and intolerable work conditions leading to Monteagudo's constructive discharge, the jury found that she had a credible fear of futility and retaliation and was, therefore, reasonable in not invoking the complaint mechanism provided in AEELA's sexual harassment policy. A-601, Question No. 3. After the verdict, AEELA renewed its Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50(b) and presented a Motion for New Trial and/or *Remittitur*. A-639-643. The district court denied both motions. A-780-783; 619-621.

AEELA filed a timely notice of appeal and an amended notice of appeal. A-785-786; 790-791. Judgment was entered January 26, 2009, affirming the jury verdict and the district court judgment in all respects. Petitioner's Appendix ("Pet. App.")-1a-32a.

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[5] The local law portion of the judgment has not been challenged by AEELA.

In its opinion, the First Circuit analyzed the reasonability of Monteagudo in failing to invoke AEELA's reporting mechanism. In the process it identified several factors that were evaluated. These factors were:

(1) the friendship between Arce and Vargas; (2) the friendship between Arce, Vargas and Crespo; (3) Figueroa's bleak assessment on Monteagudo's odds of resolving her predicament within AEELA because of the high level officials involved; (4) Vargas' substantial increase in Monteagudo's workload; (5) Vargas' threat of dismissal if Monteagudo used the union grievance mechanism;[6] (6) Vargas' ostracizing of Monteagudo after her rejection of Arce's sexual advances; (7) the failure of the witnesses to the harassment to report it as required by the policy; (8) Vargas' threat of discharge against Figueroa prior to the Monteagudo situation; and (9) the impact of the age differential between Monteagudo and Arce. The panel[7] concluded that Monteagudo was reasonable in bypassing AEELA's complaint procedure because she had "more than the ordinary fear or embarrassment." *Monteagudo*, 554 F.3d at 172.

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[6] This is a factual scenario remarkably analogous to the one presented to the jury for determination as to the second element of the *Ellerth/Faragher* affirmative defense.

[7] Judge Baldock from the Tenth Circuit sat by designation, together with Judges Torruella and Howard from the First Circuit.

Petitioner's timely request for rehearing and suggestion that rehearing be *en banc* were denied on February 20, 2009. Pet. App.-33a.

On May 21, 2009, the instant petition for writ of certiorari was presented predicated on Monteagudo's alleged unsupported subjective fear of retaliation and futility. The Petition was docketed (08-1454) on May 26, 2009. Monteagudo was afforded an extension of time until July 27, 2009 to file the instant Response in Opposition.

REASONS FOR DENYING THE PETITION FOR WRIT

The Petition intentionally misrepresents the First Circuit's position on the only issue before this Court: the evidence required for an employee to be reasonable in failing to invoke an employer's sexual harassment complaint mechanism. According to AEELA, the First Circuit has made use of the reporting mechanism "essentially voluntary." Pet. 3. Only in this fashion can petitioner articulate an ostensibly meritorious basis for its request to this Court. To further its cause it has flown the banner of Monteagudo's alleged "unsupported subjective belief" and the lack of a "credible fear of retaliation." Pet. 15, 21. In its effort AEELA has made a fatal mistake: it chose to disregard, as if allowed, the evidentiary foundation upon which the jury reached its determination that AEELA had failed its burden of

proving the second element of the *Ellerth/Faragher* affirmative defense. Moreover, it ignored the several factors identified by the First Circuit upon which the jury predicated its findings. What petitioner seeks before this Court is review of a fact-bound case with limited consequences for subsequent decisions in which the objective reasonability of an employee's decision to bypass the employer's complaint procedure may be at stake. To destroy the basis of the First Circuit's consonant application of this Court's guidelines in *Ellerth/Faragher*, AEELA has used a "compartmentalized factor analysis" incompatible with the "totality of the circumstances" approach adopted by this Court. *See, Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

In its wisdom, this Court provided a framework to address employer vicarious liability for sexual harassment by supervisors where no tangible employment action results. In those situations, the employer could escape liability by proving the two elements of the *Ellerth/Faragher* affirmative defense. First, that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and second, that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. 765; *Faragher*, 524 U.S. at 807.

The second element represents an acknowledgement by this Court that there are circumstances, as in this case, in which an employee may forego the use of the established reporting procedure. The jury's unfavorable finding at trial constitutes a straightjacket for AEELA. To reach its determination, the jury considered the several reasons presented by Monteagudo for not using AEELA's reporting mechanism. 554 F.3d at p. 172. But, as in any other affirmative defense, the employer retained the burden of persuasion on both elements.

Because of AEELA's failure to prove this second element at trial, it has chosen an alarmist approach to captivate the attention of this Court. It also explains the Petition's repeated conclusory and misleading assertions that Monteagudo based her decision to ignore AEELA's complaint mechanism on an "unsupported subjective belief." Contrary to the summary judgment opinions upon which AEELA relies, the record in this case contains instances of actual (*i.e.*, assignment of excessive work) as well as threats against Monteagudo by AEELA's Human Resources Director of future retaliation if she used the union grievance procedure. A-967. To press its point AEELA would have this Court adopt a posture requiring not a *credible* fear but evidentiary *certainty* of futility and of retaliation for a harassed employee to be objectively reasonable in not using the established procedures and indeed chastises the First Circuit for not requiring "objective evidence of *actual* futility." Pet. 15 (emphasis ours).

To advance its position AEELA relies on two principal sources: (1) *Leopold v. Baccarat*, 239 F.3d 243 (2nd Cir. 2001); and (2) Monteagudo's isolated failure to turn to Crespo, while ignoring the "totality of the circumstances" analysis often reiterated by this Court to determine "objective reasonability." *See e.g., Burlington Northern & Santa Fe Railway Co.*, 548 U.S. at 69; *Suders,* 542 U.S. at 141; *Oncale,* 523 U.S. at 81-82 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23.

A serious reading of the First Circuit's *reported* decision explaining the panel opinion while denying the petition for rehearing *en banc* in *Reed v. MBNA Marketing Systems, Inc.*, 337 F.3d 1 (1st Cir. 2003) and of the First Circuit's decision below in *Monteagudo*, should have provided AEELA sufficient cause to pause and reconsider the merits of its arguments before presenting them to this Court.[8]

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[8] The Petition's weakness is partly evidenced by its undue reliance and the forced characterization of the "objective reasonability" issue as a discrete issue of law, when it is a factually based "totality of the circumstances" inquiry proper for jury determination. *See e.g., Oncale*, 523 U.S. at 81-82; *Reed*, 333 F.3d at 37.

I. The Decision Below Does Not Create A Conflict Between The Circuits On What Constitutes Objective Reasonability For An Employee To Bypass A Valid Complaint Procedure.

The instant Petition should be denied because the First Circuit's decisions in *Reed* and *Monteagudo* correctly incorporate the tenets established by this Court to determine when an employee acts in an objectively reasonable manner. *See*, *Oncale*, 523 U.S. at 81-82; *Burlington Northern & Santa Fe Railway Co.*, 548 U.S. at 69; *Harris*, 510 U.S. at 23; *Suders*, 542 U.S. at 141.

Notwithstanding, AEELA clearly overstates its case when it charges the First Circuit with making "the employee's use of a valid complaint procedure essentially voluntary . . . " Pet. 3, through the alleged evisceration of "the careful balance this Court struck in *Ellerth* and *Faragher*" and the creation of "a clear circuit conflict" as to the nature of the evidence required for a plaintiff to be entitled to a finding that she reasonably failed to invoke the complaint procedure provided by the employer. Pet. 11.

The "clear circuit conflict" alluded to in the Petition, essentially circumscribed to and allegedly created by the First Circuit's opinions in *Reed* and *Monteagudo*, is a fabrication by AEELA to avoid the consequences of the judgment entered in favor of Monteagudo. Add.-3-5. To obtain review by this Court AEELA pretends to substitute its interpretation of

the appellate decision in *Reed* by that of the First Circuit in which the court sitting *en banc* explained that the panel decision:

> . . . makes it *clear* that a complainant *cannot bypass an adequate complaint procedure if the failure to do so was "objectively unreasonable for one in the [complainant's] position."* *Op.* at p. 37. See also op. at 37 ("Or, the jury might conclude that whatever Reed's state of mind, a reasonable person in her position would have reported Appel's assault.")
>
> The opinion also contemplated that Reed could not excuse a failure to use the complaint process based on threats of retaliation and Appel's purported family influence if "in fact" Reed was not persuaded by these threats and therefore the threats were not a cause of the failure to use the complaint process. *Op.* at 37. See also op. at 37. *But this does not eliminate the objective test for reasonableness and serves only to give additional protection to a defendant.*

Reed, 337 F.3d at 1 (emphasis supplied).[9]

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[9] The Petition unequivocally asserts that the decision in *Monteagudo* "resolved any ambiguity in *Reed*, and is now plain that the First Circuit does not require the concrete, objective evidence required by most circuits." Pet. 22, n. 8. This is ludicrous since AEELA relies on decisions that cite *Reed* for the exact proposition for which AEELA contends that the First Circuit does not stand. *See e.g., Weger v. City of Ladue*, 530 F.3d 710, 725 (8th Cir. 2007); *compare* Pet. 14, 16, 19 and 21; *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1307

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Unmistakably, the First Circuit in *Reed* reiterated the applicable test and the intention of this Court in its holdings in *Faragher* and *Ellerth*.[10] A careful review of the decision below reveals that the First Circuit has faithfully applied the holdings of those decisions given the totality of the established facts and reasonable inferences drawn from the proof admitted at trial.[11]

(11th Cir. 2007) *compare* Pet. 12, 27, 29 and 32. AEELA's blatant failure to be candid and accurate before this Court is exemplified by its citation to a passage of *Baldwin* at page 1307. Pet. 29. AEELA uses that passage to attack the First Circuit's alleged permissiveness for employees not to invoke the employer's reporting mechanism based on "subjective fears of retaliation . . . " In so doing, AEELA omits the citation to *Reed* contained in the cited passage of *Baldwin* it propounds to this Court; does not apprise this Court of the citation omitted; but also deleted the transitional phrase in the original for its proposition, to wit: **"As the First Circuit has explained."** *See* Sup. Ct. R. 15.2. This style of advocacy is, at best, completely unwarranted.

[10] Indeed, this Court recognized in *Pennsylvania State Police v. Suders*, 542 U.S. at 141 (2004) that: "The courts in *Reed* [1st Circuit] and *Robinson* [7th Circuit] properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, *mark the path constructive discharge claims based on harassing conduct must follow.*" *Suders,* 542 U.S. at p. 150 (emphasis ours).

[11] Monteagudo is aware of the First Circuit's statement that her evidence was "not overwhelming" but still sufficient for a reasonable jury to find in her favor. After all, this case is before this Court on a denial of AEELA's Fed. R. Civ. P. 50(b) and the First Circuit's statement as to the sufficiency of the evidence presented and of the applicable standard is accurate. *See e.g.,*

(Continued on following page)

It should be noted that every decision cited and discussed by AEELA in support of its Petition is distinguishable from the district court's decision and the First Circuit's in an important respect: the jury's finding that Monteagudo was "constructively discharged from her employment at AEELA specifically as a consequence of sexual harassment," a finding which AEELA fails to even mention in its entire Petition. A-601, Question No. 1. The evidence underlying this finding was also relevant to the First Circuit's determination as to whether a reasonable jury could conclude that Monteagudo could bypass the complaint procedure under the facts of her case. *See, Monteagudo*, 554 F.3d at 168-169 and n. 4. AEELA does not address it in the Petition.

Two corollaries from the jury's first finding remain unchallenged by AEELA: (1) that she was submitted to sexual harassment so pervasive and severe that it altered her working conditions; and (2) that "the abusive working environment became so intolerable that her resignation qualified as a fitting response. Monteagudo met both objective standards. *Harris*, 510 U.S. at p. 21; *Suders*, 542 U.S. at p. 141. Yet, AEELA does not mention to this Court that the jury was not only permitted but required to consider the totality of the circumstances established by the trial evidence, including that supporting the findings

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Unitherm Food Systems v. Swift-Eckrich, Inc., 546 U.S. 394, 402 (2006).

of sexual harassment and subjection to intolerable working conditions, to determine if she had an "objectively reasonable fear of retaliation" to excuse her resort to the employer's procedure to complain. *See, Harris*, 510 U.S. at 23; *Oncale*, 523 U.S. at 81; *Burlington Northern & Santa Fe Railway Co.*, 548 U.S. at 69; *Suders*, 542 U.S. at 141.

Scrutiny of this "compartmentalized" vis-à-vis the "totality of the circumstances" approach serves to detect and highlight for this Court the dubious foundation upon which the Petition has been constructed.[12] First, AEELA omits any reference to the finding that Monteagudo was the victim of a sexually based constructive discharge. Second, AEELA addresses, in complete isolation, the various

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[12] As part of its attack, AEELA claims that the First Circuit in the opinion below failed to give "legal content to this Court's 'reasonableness' requirement," and mocks the court's reference to the juries' role in this endeavor because they "are supposed to be good at . . . evaluating reasonable behavior in human situations, . . . " Pet. 21. Again, AEELA's posture is untenable. For instance, in *Oncale*, this Court recognized:

> The real social impact of workplace behavior often depends on a *constellation of surrounding circumstances, expectations, and relationships* which are not fully captured by a simple recitation of the words used or the physical acts performed. *Common sense and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.*

Oncale, 523 U.S. at 81-82 (emphasis ours).

reasonability factors established by the evidence at trial and considered by the jury, the district court and analyzed in the opinion below by the First Circuit. Based on the evidence at trial, AEELA cannot establish Monteagudo's unreasonableness if the entire "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed" is analyzed. *Oncale*, 523 U.S. at 82.

In the opinion below, the First Circuit engaged in the required inquiry and identified several factors and ascribed to them different degrees of importance. 554 F.3d at 172. These factors were: (1) the friendship between Arce and Vargas; (2) the friendship between Arce, Vargas and Crespo; (3) Figueroa's bleak assessment on Monteagudo's odds of resolving her predicament within AEELA because of the high level officials involved; (4) Vargas' substantial increase in Monteagudo's workload on the next working day after her rejection of Arce's sexual advances; (5) Vargas' threat of dismissal if Monteagudo used the union grievance mechanism to question the additional workload; (6) Vargas' ostracizing of Monteagudo after her rejection of Arce's sexual advances; (7) the failure of the witnesses to report the harassment as required by the policy; (8) Vargas' threat of discharge to Figueroa prior to the Monteagudo situation; and (9) the impact of the age differential between Monteagudo and Arce. Now, let us discuss why in light of this evidence AEELA's Petition should be denied.

AEELA rests its chances of review on Monteagudo's alleged unsupported fear of retaliation by Crespo if she had gone directly to him and reported Arce's harassment. Pet. 16-17. The evidence admitted establishes that this is incorrect. It is not surprising that the First Circuit points out that Monteagudo was "understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas' relationship with Arce." 554 F.3d at 172. But the court immediately acknowledged that the "more difficult question, however, was whether Monteagudo's failure to report Arce's conduct to Crespo was unreasonable on the basis of Crespo's alleged[13] friendship with Arce and Vargas." *Id.*

Before reaching its conclusion that Monteagudo was reasonable in not reporting the harassment to AEELA, including directly to Crespo, the First Circuit engaged in the mandatory analysis required by this Court and analyzed the other evidence that had to be factored in to reach its conclusion. Because the First Circuit considered the interrelation between all of the factual components for the inquiry before it, the court was justified in concluding that "while Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could find in her favor because her failure to report the harassment was based on 'more than ordinary fear or embarrassment'

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[13] After the jury verdict, the friendship between Arce, Vargas and Crespo was no longer "alleged" but a *fait accompli* established by the trial evidence.

and was therefore reasonable." 554 F.3d at 172. This analysis and its conclusion are completely consistent with this Court's decisions in *Ellerth* and *Faragher*.

To create its "conflict on the Petition's paper," AEELA substantially relies on *Leopold v. Baccarat*, 239 F.3d 243 (2nd Cir. 2001) and its contrast with the First Circuit's position that the *only manner* for an employee to establish a *credible fear* of retaliation is *not* by producing evidence "to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints." *Id.* at 246. AEELA's myopic interpretation of *Leopold* is discredited by the Second Circuit in the same decision where the court explained that:

> Once an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the *burden of production* shifts to the employee to come forward with *one or more reasons* why the employee did not make use of the procedures. The employer may rely upon the *absence or inadequacy* of such justification in carrying its ultimate burden of persuasion.

Id. (emphasis supplied).

The reference in *Leopold* to the "absence or inadequacy of such justification" is important to understand *Leopold* and the reasons why it is not in conflict with the First Circuit. Contrary to Monteagudo's evidentiary showing in this case, the

plaintiff in *Leopold* offered "nothing from the extensive record in [the] case to substantiate her fears." *Id.* (emphasis ours). Had AEELA sought to have the jury charged under *Leopold*, the jury finding would not have necessarily been different.

Furthermore, the existence of *Leopold* at the time of trial in this case, coupled with AEELA's failure to request an instruction under it, constitutes tacit recognition on its part that the Second Circuit did not intend its decision to be as restrictive as AEELA portrays it to be throughout its Petition. Otherwise, an employee who reasonably failed to report harassment *before the procedure had ever been tested* would be automatically deprived of the protection afforded by Title VII. Such result would be required not under the Second Circuit's but only under AEELA's self-serving interpretation of *Leopold* that actual evidence of retaliation is the only avenue for an employee to have a credible fear and therefore be allowed to obviate use of the reporting mechanism. It would also be absurd.[14]

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[14] The evidence of proof of effectiveness of the policy which AEELA attempted to introduce at trial was for a complaint in 2005, that is, three years after the facts in this case. 554 F.3d at 173-174. Inevitably in 2002, Monteagudo would have been precluded from producing actual evidence of effectiveness of the policy if the first time that it was effectively used was three years later. Consequently, she would have been deprived of redress as a result thereof. This would have been an absurd result, indeed.

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Viewed in its full and proper context as one of the factors inherent to the reasonability inquiry, Monteagudo's failure to report Arce's harassment directly to Crespo was also reasonable under *Ellerth* and *Faragher*. The reasonability determination is buttressed by the evidence that Vargas, AEELA's Human Resources Director, was aware of the harassment by Arce and was also an active participant in the ensuing retaliation.

The language of AEELA's reporting mechanism in the anti-sexual harassment policy evinced an intention to provide an alternative and impartial avenue for victimized employees to report harassment if the Human Resources Director was either the harasser or was closely related to the harasser. A-156. This impartial avenue for reporting sexual harassment was AEELA's Executive Director. *Id.* The Executive Director is "the highest authority within [AEELA] . . . at the administrative level." A-795-796.

In this case, however, there was evidence elicited by AEELA that the individual holding the Executive

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At this, juncture it is worth pointing out AEELA's misrepresentation to this Court to the effect that in allegedly rejecting the holding in *Leopold* the First Circuit went "so far as to uphold the exclusion of evidence of **past responsiveness**." Pet. 11 (emphasis supplied); Sup. Ct. R. 15.2. No proffer concerning the proposed admission of evidence of the policy's effectiveness before the harassment of Monteagudo was made at trial. Therefore, with the evidence proffered at trial, AEELA could not have established the **past responsiveness** under the policy upon which the Petition unduly relies.

Director position at the time of Monteagudo's harassment, *i.e.*, Crespo, was a friend of both, the harasser and of the Human Resources Director. A-976. Indeed, according to the policy, the only reason for a sexual harassment claim to be reported to the Executive Director would be because the Human Resources Director was either the harasser or someone close to him. Thus, the jury could take into consideration that in the specific circumstances of this case, the intention of the drafters of the policy was thwarted because the intended "alternative and impartial" avenue for reporting harassment was "contaminated" and may no longer have been "impartial" nor a real "alternative" for Monteagudo to report Arce's harassment.

But the jury's decision did not need to rest on that factor alone. Hence, this was another factor to be considered in the jury's determination that Monteagudo was reasonable in not reporting the harassment by Arce, including going directly to Crespo.[15] Accordingly, the First Circuit acknowledged that this was a "more difficult question" than the friendship between Arce and Vargas. 554 F.3d at 172. But in contrast with AEELA's position, the caselaw does not require

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[15] In its Petition, AEELA predicates its attack on Crespo's friendship on the Fourth Circuit's decision in *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001). Unlike *Monteagudo*, the plaintiff in *Barrett* was found to have been unreasonable in not reporting harassment because she *exclusively* relied on the friendship between the harasser and the managers, including a former Vice-President. *Id.*

certainty of futility or retaliation but rather a "credible fear." *See e.g., Leopold*, 239 F.3d at 246.[16]

Also, *Leopold* is distinguishable in another important respect: Monteagudo was actually retaliated against by the Human Resources Director, using the authority of his office as such, and as a result of her rejection of his friend's unwelcome attempt to kiss her. In this respect *Leopold*, as well as every other case cited by AEELA in its Petition, is inapposite to this case.

Monteagudo produced evidence at trial from which a reasonable jury could find that she had the required "credible fear" of retaliation to justify her decision to forego use of the complaint procedure. She explained:

> And my fear was [that] they would *take reprisals like they had done before* simply because I did not want to be with someone from the Association.

A-1002 (emphasis supplied).

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[16] Decisions subsequent to *Leopold* within the Second Circuit recognize that a plaintiff has the burden of producing evidence of one or more reasons "showing that his or her fear is 'credible,' *such as* proof 'that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints.'" *Finnerty v. William H. Sadlier, Inc.*, 176 Fed.Appx. 158 (2nd Cir. 2006) *citing Leopold*, 239 F.3d at 246 (emphasis ours); *see also, Stofsky v. Pawling Cent. School Dist.*, 2009 WL 804085, Slip Opinion at 18 (S.D.N.Y. 2009); *Wildman v. Verizon Corp.*, 2009 WL 104196, Slip Opinion at 4 (N.D.N.Y. 2009).

The retaliation she referred to was that stemming from her rejection of Arce's attempt to kiss her in the presence of Vargas, his friend and Human Resources Director. The evidence established that Vargas became the "retaliating supervisor."[17] Before engaging in any retaliation, Vargas had been a drinking buddy of Arce; a "silent partner" in his harassment of Monteagudo; and one of the four who would have gone on double dates, if Monteagudo had yielded to their pressure. A-961. Monteagudo produced evidence of the reasons for her decision not to invoke AEELA's complaint procedure. These reasons provided the basis for the jury, the district court and the First Circuit to conclude that she was reasonable in not reporting the harassment to AEELA. In direct contrast to her, the employee in *Leopold* offered "nothing from the extensive record in th[e] case to substantiate [her] fears." 239 F.3d at 246 (emphasis supplied). In sharp contrast to

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[17] No such figure or equivalent exists in any of the cases cited by AEELA in its Petition. This Court in *Suders*, however, discussed the First Circuit's decision in *Reed* and *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003).

Although *Robinson* involved a tangible employment action constructive discharge, the facts there are almost identical to this case. In *Robinson* the harassing supervisor's supervisor was the one whom, using the power of his office as "presiding judge," provided the "official act" that gave rise to the tangible employment action. In this sense, this case has a closer resemblance to the tangible employment action constructive discharge in *Robinson* than the non-tangible employment action involved in *Reed*. Here, Vargas was the equivalent of the "presiding judge" in *Robinson*.

Monteagudo, most of the employees in the cases upon which the Petition relies failed to offer any proof to substantiate their fears and thus their actions were dismissed as a matter of law before going to trial. Yet, AEELA loosely equates Monteagudo to the other plaintiffs whom their respective courts found that dismissal of their actions was warranted in light of the unsupported and subjective fears of futility or retaliation.[18]

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[18] The production of evidence by Monteagudo as to the reasonability of her actions in failing to use AEELA's procedure explains petitioner's failure to request an instruction under *Leopold*, which had been decided six years before this case went to trial or most of the cases cited in support of this proposition in its Petition: *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 932 (8th Cir. 2008) (Adams "offers no evidence to show that the fear was either genuine or reasonable.") *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001) (only evidence of friendship between managers was presented); *Harper v. City of Jackson Municipal School Dist.*, 149 Fed. Appx. 295, 302 (5th Cir. 2005) ("Harper failed to substantiate her fears."); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003) ("Holly D. has presented no evidence to indicate that a different conclusion would be appropriate here."); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000); *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004); *Pinkerton v. Colorado Dept. of Transportation*, 563 F.3d 1052, 1063 (10th Cir. 2009) (Ms. Pinkerton never offered any reason in her briefs . . . only expressed a "fear that Mr. Martínez would retaliate against her."); *Shaw v. Autozone*, 180 F.3d 806, 813 (7th Cir. 1999) ("she did not feel comfortable enough . . . "); *Terwilliger v. Greyhound Lines, Inc.*, 822 F.2d 1033 (6th Cir. 1989); *Thornton v. Federal Express Corporation*, 530 F.3d 451, 457 (6th Cir. 2008) ("Plaintiff has not adduced evidence demonstrating that she was under a 'credible threat of retaliation.'");

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Another factor identified by the First Circuit and attacked as improper by AEELA is the court's consideration of the age differential between Monteagudo and her harasser. In its desperation, AEELA goes as far as claiming that the consideration of this factor by the First Circuit constitutes another independent "conflict" to justify this Court's intervention. Pet. 23-24. AEELA does not, however, point to any limitation by this Court or any other to afford "at least some relevance" to the age differential or any other factor as part of the required "totality of the circumstances" analysis. The jury and the district court were able to see the demeanor of the harasser and of the harassed, were inevitably aware of the age difference, heard their testimony and may have taken it into consideration as part of the decision-making process leading to the finding that Monteagudo was reasonable in not invoking the complaint procedure. *See, Oncale*, 523 U.S. at 81-82.

Of the factors identified by the First Circuit to conclude that Monteagudo had a credible fear of retaliation, AEELA only addresses those related to its reliance on *Leopold* and the age differential. The other factors serve to provide the pieces for the jigsaw puzzle of the "totality of the circumstances" establishing

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Walton v. Johnson & Johnson Svs., Inc., 347 F.3d 1272 (11th Cir. 2003); *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) ("record is devoid of any threat of retaliation" and thus "Plaintiffs fear of retaliation is not credible . . . "); *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405 (5th Cir. 2002).

Monteagudo's objective reasonableness. These included: (1) Figueroa's bleak assessment on Monteagudo's odds of resolving her predicament within AEELA because of the high level officials involved;[19] SA-19; (2) Vargas' substantial increase in Monteagudo's workload on the next working day after her rejection of Arce's sexual advances; (3) Vargas' threat of dismissal if Monteagudo used the union grievance mechanism to question the additional workload; (4) Vargas' ostracizing of Monteagudo after her rejection of Arce's sexual advances; (5) the failure of the witnesses to report the harassment as required by the policy; and (6) Vargas' threat of discharge to Figueroa prior to the Monteagudo situation; and (7) the impact of the age differential between Monteagudo and Arce.

This evidence supported that the jury's findings of hostile work environment sexual harassment; constructive discharge; and Monteagudo's objectively reasonable decision not to avail herself of the complaint procedure are all internally consistent. Even when analyzed together with the finding that AEELA had "approved an anti-sexual harassment policy which provided the procedure for employees to channel their claims and that the policy was disseminated among the employees . . . " the consistency is not lost. A-601, Question No. 2.

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[19] Vargas had also threatened Figueroa with discharge on an unrelated incident prior to the situation with Monteagudo. SA-28. Thus, the jury could take this evidence into consideration to evaluate how upper management handled employee concerns.

II. This Case Is An Inappropriate Vehicle To Address The Question Presented Even If Guidance Were Necessary

It should be clear by now that the case portrayed by AEELA is not the appropriate vehicle for guidance on the question it presents because it is different in important respects to the one adjudicated by the jury, the district court and the First Circuit.[20] The case under consideration does not warrant any further review from this Court because the applicable standard was followed and the case was correctly decided on the evidence admitted at trial.

In order to make of this case an "ideal vehicle," AEELA has grossly misrepresented the import of the First Circuit's decisions to this Court. *See,* n. 12, above. Additionally, it has referred to crucial evidence in a manner that deprives it of its importance to the merits of the instant Petition. For instance, in the context of sexual harassment, the difference between harassment by a co-worker or by a supervisor has tremendous impact on the contours of the inquiry and the availability of, among others, the *Ellerth/Faragher* affirmative defense. If the harasser happens to be a supervisor, as in this case, the nature of his actions are essential to the determination of whether a

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[20] Monteagudo respectfully submits that, based on the procedural history of this case, her formulation of the question presented is more accurate than petitioner's and depicts the lack of compelling reasons to issue the requested writ.

constructive discharge constitutes a tangible employment action or not. *Suders*, 542 U.S. at 148.[21]

If the Human Resources Director is aware of and is an active participant in harassment, the consequences for the employer are considerably more difficult to avoid. In the Petition, AEELA self-servingly refers to its Human Resources Director, at the precise moment when he is a witness to the last incident of sexual harassment, as a mere "co-worker." While it is correct that Vargas was a "co-worker" of Monteagudo because they both worked for AEELA, its choice of words unduly detract from the significance of the situation. Vargas was the supervisor of the "harassing supervisor" at the Human Resources Department and was primarily entrusted with enforcement of AEELA's anti-sexual harassment policy, including its complaint procedure. Compare A-961 and Pet. 4 (doctoring the record by closing quotation marks after "together" and substituting Del Valle and Vargas for "other coworkers").[22] Vargas' presence at

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[21] Monteagudo did not pursue on appeal whether her constructive discharge constituted a tangible employment action although it was tantamount to one. *Monteagudo*, 554 F.3d 164, 171 at n. 6 (1st Cir. 2009). This does not mean, however, that the jury was precluded from assessing the evidence admitted at trial in its inquiry as to the objective reasonableness of her failure to invoke AEELA's complaint procedure.

[22] The wording selected by AEELA tends to hamper this Court's task of determining if "compelling reasons" exist to grant the Petition, regardless of whether this also constitutes a "misstatement of fact" under Sup. Ct. R. 15.2. *See*, Sup. Ct. R. 10. Also, the presence of Marilyn Del Valle at the parking lot

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the parking lot where Monteagudo rejected Arce's attempt to kiss her constituted knowledge of the sexual harassment by the employer. *See e.g., Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63-64 (2nd Cir. 1998); *Chaloult v. Interstate Brands*, 540 F.3d 64, 75-76 (1st Cir. 2008) *citing, Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 422-23 (11th Cir. 1999) ("*Dees* concerned the adequacy of evidence that the harasser's *supervisors* had knowledge of the harassment and did nothing.") (Emphasis in original). Rather than reporting the harassment as he was required by AEELA's policy, Vargas commenced to pressure Monteagudo until she was constructively discharged. A-810.

Notwithstanding Vargas' presence at the parking lot incident, AEELA asserts before this Court that "Respondent did not mention the alleged harassment in the parking lot (or any other harassment) in this complaint to Vargas." Pet. 5 (emphasis supplied); *compare, Monteagudo*, 554 F.3d at 172, n. 7. The reason was obvious, Vargas was present at the time of the incident and knew of his responsibilities under the anti-sexual harassment policy. A-810; 911; 957. He

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when Arce attempted to kiss Monteagudo, belies AEELA's statement in the Petition that the "only witness besides respondent to an incident of possible harassment was a fellow employee named José Francisco Figueroa-Cana." Pet. 4, n. 1 ("inappropriate conduct"); Pet. 5; *compare*, A-918-919; *see also, Monteagudo*, 554 F.3d at 172, n. 7.

did not fulfill any of them and the jury was aware of this.

The "ideal vehicle" for review cannot be manufactured through the distortion of the evidence admitted at trial and the reasonable inferences the jury was entitled to draw from it. That is the evidence that provides the factual background against which the Petition shall be considered. For purposes of the Petition, AEELA has gone to great lengths to avoid facing that it has to live with facts established such as that the "harassing" and the "retaliating" supervisors were friends and drinking buddies. A-917-919; 955-957. At trial, it was AEELA's counsel whom elicited the evidence to establish for the jury their friendship with the Executive Director, Pablo Crespo. A-976. Thus, the jury was entitled to conclude that the three were friends. Hence, the jury was at liberty to infer from the evidence before it that Monteagudo, like any other reasonable person in her position, to expect that friends in powerful positions tend to protect friends in sticky situations. It was reasonably foreseeable for Crespo to protect Arce and Vargas.[23] Certainly, the jury did not have to make this

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[23] Notwithstanding that Crespo was a witness at trial, AEELA did not inquire as to the nature of his friendship with Vargas and Arce after Monteagudo established that he may have gone out for drinks with Vargas and/or Arce. However, Crespo testified that he knew Vargas from their previous employment at the Senate of Puerto Rico and that he was the one who recommended Vargas for the position of Director of Human Resources to AEELA's Board of Directors. App. 798-799.

inference to hold in favor of Monteagudo if it faithfully followed the application of the guidelines provided by this Court in *Ellerth* and *Faragher*.

Thus, the case of Monteagudo, the one grounded on the trial evidence and not the one favorably crafted by AEELA without regard to the jury's prerogative to examine the evidence and draw any reasonable inference from it, is the only one upon which the merits of the opinion below may be assessed. Monteagudo respectfully submits that it is not the "ideal vehicle" to warrant this Court's intervention and that no compelling reasons exist to issue the writ.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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